No. 88-5050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL HOLLAND,

Petitioner,

—v.—

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF ILLINOIS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF ILLINOIS, AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is the fair cross-section requirement of the Sixth Amendment violated by a prosecutor's use of peremptory challenges to exclude Black jurors solely on account of their race?

2. Does a prosecutor's use of peremptory challenges to exclude Black jurors solely on account of their race violate the Sixth Amendment only if the defendant is also Black?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

STATUTES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

INTEREST OF AMICI*/

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with over 250,000 members dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws of this country. The ACLU of Illinois is one of its state affiliates.

As part of its commitment to legal equality, the ACLU has long opposed any and all forms of racial discrimination in the administration of justice. Of particular relevance here, the ACLU represented petitioner in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 478 U.S. 1001 (1986), the first federal case holding that a prosecutor's use of

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*/ Pursuant to Rule 36.2, letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

peremptory challenges to screen prospective jurors on the basis of race violates the Sixth Amendment.

The NAACP Legal Defense and Educational Fund, Inc., is a nonprofit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid without cost to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years, its attorneys have represented parties and have participated as amicus curiae in this Court and in the lower federal courts in cases involving many facets of the law.

The Fund has a long-standing concern with the issue of exclusion of Blacks from service on juries. Thus, it has raised jury discrimination claims in appeals from criminal convictions,[1] pioneered in the affirmative use of civil actions to end discriminatory practices[2] and, indeed, represented the petitioner in Swain v. Alabama, 380 U.S. 202 (1965), the case which first raised the issue of the use of peremptory challenges to exclude Blacks from jury venires.

More recently, both the ACLU and the Fund participated as amicus curiae in Batson v. Kentucky, 476 U.S. 79 (1986), and

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1/ E.g., Alexander v. Louisiana, 405 U.S. 625 (1972).

2/ Carter v. Jury Commission, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Mitchell v. Johnson, 250 F.Supp. 117 (M.D.Ala. 1966).

Teague v. Lane, 109 S.Ct. 1060 (1989), two cases that raised issues similar to the issues presented here.

STATEMENT OF THE CASE

The petitioner in this case was convicted by an all-white jury after the prosecutor used his peremptory challenges to exclude the only two potential Black jurors. Petitioner objected to those exclusions both at trial and on appeal. His objections were rejected by the Illinois state courts at every stage.

Most significantly, the Illinois Supreme Court ruled that petitioner did not have standing to raise a Batson claim because he is white and the excluded jurors were Black. People v. Holland, 121 Ill.2d 136, 157 (1988). The Illinois Supreme Court also rejected petitioner's Sixth

Amendment claim on the ground that the fair cross-section requirement of the Sixth Amendment does not apply to the petit jury. Id. at 158.

SUMMARY OF ARGUMENT

Under the Sixth Amendment, every criminal defendant has the constitutional right to be tried before an impartial jury drawn from a fair cross-section of the community. Contrary to the view of the court below, this fair cross-section requirement does not apply only to the jury venire. Indeed, any such limitation would be illogical and self-defeating.

The only function of the jury venire is to serve as a pool from which petit juries are chosen. The only reason for insisting that the jury venire reflect a fair cross-section of the community is to

maximize the possibility that petit juries chosen from that pool will be similarly representative.

That possibility may not always ripen into reality. In individual cases, the process of random selection and non-racial exclusion may produce all-white or all-Black juries. For both practical and principled reasons, therefore, the Constitution does not guarantee proportional representation on the petit jury, nor does petitioner seek that result. It is quite another thing, however, when the government uses its peremptory challenges as part of an intentional strategy to exclude potential jurors solely because of their race. There is no state interest that supports such behavior, as this Court properly recognized in Batson v. Kentucky, 476 U.S. 162 (1986).

While Batson obviously rested on equal protection grounds, the government's deliberate misuse of its peremptory challenges is also inconsistent with the underlying purposes of the fair cross-section requirement. Indeed, this Court has invoked the fair cross-section requirement on several occasions to strike down other efforts by the government to distort the jury selection process based on impermissible criteria. The analysis in this case should be precisely the same.

The fact that the petitioner in this case is white and the excluded jurors were Black should have no bearing on the outcome. The values served by the fair cross-section requirement do not turn on the racial or sexual identity of the defendant. Thus, in Taylor v. Louisiana, 419 U.S. 522, 526 (1975), this Court specifically upheld

a male defendant's standing to challenge the exclusion of female jurors on fair cross-section grounds.

The decision in Taylor effectively resolves the standing issue in this case. More generally, however, amici believe that the rationale of Taylor should apply in any case involving discriminatory jury selection, regardless of the constitutional theory on which the case proceeds. As this Court observed in Peters v. Kiff, 407 U.S. 493, 498 (1972), "[t]he exclusion of Negroes from jury service, like the arbitrary exclusion of any other well-defined class of citizens, offends a number of related constitutional values." Not the least of these is the interest of the excluded juror, who has no other practical way to voice her complaint except through the medium of the defendant.

Amici acknowledge, of course, this Court's reference in Batson to a criminal defendant's right to challenge potential jurors "of the defendant's race." 476 U.S. at 96. In light of contrary precedent, however, amici respectfully suggest that this reference can best be understood as an allusion to the facts of Batson and not a statement of the controlling law, even in equal protection cases.

ARGUMENT

I. A PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE POTENTIAL JURORS SOLELY ON ACCOUNT OF RACE VIOLATES THE FAIR CROSS-SECTION REQUIREMENT OF THE SIXTH AMENDMENT

The principal issue in this case is whether a prosecutor's use of peremptory challenges to exclude potential jurors on the basis of race violates the fair cross-section requirement of the Sixth Amend-

ment.3/ Four members of this Court expressed their views on that subject only a few weeks ago in Teague v. Lane.4/ All four agreed with Justice Stevens, who wrote:

> It is clear to me that a procedure that allows a prosecutor to exclude all black venirepersons, without any reason for the exclusions other than their race appearing in the record, does not comport with the Sixth Amendment's impartiality requirement.

109 S.Ct. at 1079 n.1. See also, id. at 1079 (Blackmun, J.); id. at 1091-92 (Brennan and Marshall, JJ.).

This Court's decisions fully support that conclusion. Indeed, this Court has

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3/ The jury trial provisions of the Sixth Amendment were applied to the states through the Fourteenth Amendment in Duncan v. Louisiana, 391 U.S. 145 (1968).

4/ Because of its holding on the scope of habeas relief, the majority opinion expressly declined to address the Sixth Amendment question presented in Teague. 109 S.Ct. at 1069.

repeatedly stressed that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Taylor v. Louisiana, 419 U.S. at 528.

Thus, in Smith v. Texas, 311 U.S. 128, 130 (1940), the Court declared that the exclusion of racial groups from jury service was "at war with our basic concepts of a democratic society and a representative government." In Ballard v. United States, 329 U.S. 187, 191 (1946), the Court relied on a federal statutory "design to make the jury 'a cross-section of the community,'" in reversing a conviction by a jury from which all women had been excluded. In Brown v. Allen, 344 U.S. 443, 474 (1953), the Court asserted that jury lists must "reasonably reflect[s] . . . a cross-section of

the population suitable in character and intelligence for that civic duty." And in Williams v. Florida, 399 U.S. 78, 100 (1970), the constitutional validity of a six-person jury was upheld on the ground that it was both "large enough to promote group deliberation . . . and to provide a fair possibility for obtaining a representative cross-section of the community."

Summarizing this case law in Taylor, the Court declared:

> We accept the fair-cross-section as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system . . . "[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946)(Frankfurter, J., dissenting).

419 U.S. at 530-31.

The requirement of a fair cross-section in jury selection has also been adopted by statute as "the policy of the United States."5/ The basis for this

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5/ See Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§1861, et seq. Section 1862 provides:

> No citizen shall be excluded from jury service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status.

See also, Uniform Jury Selection and Service Act, §2 (National Conference of Commissioners on Uniform State Laws, 1970).

"policy" was set forth in the accompanying House Report:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result -- biased in the sense that they reflect a slanted view of the community they are supposed to represent.

H.R.Rep. No. 1076, 90th Cong., 2d Sess. 8 (1968), quoted in Taylor v. Louisiana, 419 U.S. at 529 n.7.

Respondent does not quarrel with this general proposition. Instead, the state argues that the fair cross-section requirement applies only to the jury venire and not to the jury panel. This Court has never adopted that proposition, at least in the very broad sense that respondent now urges it. To the contrary, this Court has often referred with approval to the fair

cross-section requirement in cases dealing solely with the composition of the petit jury.

For example, in Ballew v. Georgia, 435 U.S. 223 (1978), this Court held that a five-person jury was too small to represent the community's judgment in a meaningful way -- in part because a five-person jury threatened "the representation of minority groups in the community," id. at 236 -- although there was no indication that the jury venire was in any way defective or unrepresentative.

Similarly, in Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court struck down a legislative scheme that permitted the prosecution to challenge for cause any potential juror opposed to the death penalty. In Witherspoon, as in Ballew, the concern focused clearly on the jury panel

rather than the jury venire. See also Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972); Williams v. Florida, 399 U.S. 78, 100 (1970).6/

That focus is plainly correct. The point of demanding a representative jury pool is to maximize the chance of obtaining a representative jury. McCray v. Abrams, 750 F.2d at 1124-25. The intentional exclusion of potential jurors on the basis of race, whether in the process of compiling a jury pool or selecting a jury panel, is equally destructive of this constitutional goal.7/ "[T]he State may

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6/ For a careful analysis of this Court's Sixth Amendment decisions, see McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 106 S.Ct. 3289 (1986).

7/ Another goal of the fair cross-section requirement recognized in Taylor is to promote "public confidence in the fairness of the criminal justice system." 419 U.S. at 530. Such confidence (continued...)

not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.'" Batson, 476 U.S. at 88.

Amici do not suggest that the jury chosen in any particular case must faithfully duplicate the demographic profile of the surrounding community. See Teague v. Lane, 109 S.Ct. at 1090-91 (Brennan, J., dissenting). As this Court has held, "[d]efendants are not entitled to a jury of any particular composition." Taylor v. Louisiana, 419 U.S. at 538. But the constitutional imperative of an impartial jury drawn from a fair cross-section of the community that Taylor endorsed is undenia-

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7/ (...continued)
is unlikely to be felt by a minority community that observes the systematic exclusion of every Black juror through the prosecutor's use of peremptory challenges.

bly frustrated by the prosecutor's use of peremptory challenges to exclude potential jurors on the basis of race alone.[8/]

Lockhart v. McCree, 476 U.S. 162 (1986), is not to the contrary. Fairly read, the statement in Lockhart that "extension of the fair-cross-section requirement to petit juries would be unworkable and unsound," id. at 174, only rejected the notion of proportional representation on the petit jury. It did not reject, or even address, the claim presented by petitioner here.

8/ "When the prosecution employs its peremptory challenges to remove from jury participation all Negro jurors, the right guaranteed in Taylor is denied just as effectively as it would be had Negroes not been included on the jury rolls in the first place." Harris v. Texas, 467 U.S. 1261, 1262 (1984)(Marshall, J., dissenting from the denial of certiorari).

Indeed, shortly after Lockhart was announced, this Court vacated and remanded the decisions in Abrams v. McCray, 478 U.S. 1001 (1986), and Michigan v. Booker, 478 U.S. 1001 (1986) -- two cases holding that the discriminatory use of peremptory challenges violates the Sixth Amendment -- without even mentioning Lockhart.[9/] Furthermore, the Sixth Amendment rulings in McCray and Booker were reaffirmed on remand and, in each case, this Court subsequently declined review. See Booker v. Jabe, 801 F.2d 871 (6th Cir. 1986), cert. denied, 479

9/ Both cases were remanded "for further consideration in light of" Batson and the retroactivity ruling in Allen v. Hardy, 478 U.S. 255 (1986). Chief Justice Burger filed a dissenting opinion from the remand order in Booker, in which he argued that its Sixth Amendment holding should be summarily reversed. 478 U.S. at 1001-02. Even Chief Justice Burger, however, did not mention Lockhart as the basis for his conclusion. Moreover, no other member of the Court joined in his opinion.

U.S. 1046 (1987); Roman v. Abrams, 822 F.2d 214, 224-27 (2d Cir. 1987), cert. denied, ___ U.S. ___, 57 U.S.L.W. 3570 (Feb. 27, 1989).

The flaw in respondent's reliance on the rule against proportional representation is best illustrated by example. Assume a county that is 20% Black and that has a jury roll that is also 20% Black. In trial #1, 20 potential jurors are randomly selected, one of whom is Black, a result well within the range of probability. That single Black is then excused for a valid, racially-neutral reason. The resulting, all-white jury does not violate the Sixth Amendment, and neither petitioner nor amici have ever claimed otherwise.10/

10/ It is in this narrow sense that the majority in Teague distinguished this Court's reliance on statistical comparisons in Duren v. Missouri, 439 (continued...)

In trial #2, twenty potential jurors are once again chosen through a process of random selection. This time, four of the selected jurors are Black, or 20%. Utilizing neutral criteria, two of the Blacks are excused from jury service. Not content with that outcome, our hypothetical prosecutor then challenges the remaining two Black jurors on racial grounds, thus affirmatively creating an unrepresentative jury.

10/ (...continued)
U.S. 357 (1979), to establish a violation of the fair cross-section requirement with regard to the jury venire. 109 S.Ct. at 1070 n.1. The inappropriateness of statistical evidence in certain contexts, however, has never meant that discrimination cannot be proved in other ways. Cf. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Indeed, that recognition formed the basis for this Court's decision in Batson. There is no apparent reason why the evidentiary rules should be any different in a Sixth Amendment case.

Under any reasonable interpretation of the Sixth Amendment, this invidious manipulation of the jury system must be deemed unconstitutional. To rule otherwise would mean that the Sixth Amendment guarantees little more than the right of Blacks and other minorities to be summoned for jury duty and then summarily dismissed because of their race. The constitutional framers could not have intended such a hypocritical result.

II. A DEFENDANT'S RACE SHOULD NOT DETERMINE HIS STANDING TO CHALLENGE A VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT

In holding that a white defendant lacks standing to object to the discriminatory exclusion of Black jurors, the Illinois Supreme Court made two fundamental errors. First, its judgment that a white

defendant suffers no injury-in-fact when Black jurors are excluded necessarily rests on precisely the sort of racial stereotyping that this Court rejected as improper in Batson. Second, its decision implicitly assumes that the defendant's interest is the only interest of constitutional magnitude in assessing the impact of an unrepresentative jury. This Court has never taken such a narrow view of the jury's role in the administration of justice.

Having begun with false premises, it is hardly surprising that the Illinois Supreme Court ultimately reached a conclusion that directly conflicts with explicit rulings of this Court on the standing question. Specifically, in Peters v. Kiff, 407 U.S. 493, 504 (1972), the Court held that

> whatever his race, a criminal defendant has standing to challenge the system used to select his grand or

> petit jury, on the ground that it arbitrarily excludes from service the members of any race . . . .

Likewise, in Taylor v. Louisiana, this Court upheld the right of a male defendant to challenge the exclusion of women from jury service, stating:

> Taylor was not a member of the excluded class; but there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service.

419 U.S. at 526.

The distinction that the Illinois Supreme Court drew for standing purposes between white and Black defendants only makes sense if one assumes that jurors are more likely to vote their race than their conscience. Operating on that assumption, the court below appeared to believe that a white defendant's chance for acquittal actually increased (or at least did not

diminish) by the exclusion of potential Black jurors. Thus, the court implied, a white defendant has nothing to complain about under those circumstances.

It is just as inappropriate, however, to base standing doctrine on racial stereotypes as it is to base a prosecutor's use of peremptory challenges on racial stereotypes. As Batson makes clear:

> Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. A person's race simply "is unrelated to his fitness as a juror."

476 U.S. at 87 (citations omitted).

Once jurors are seen as individuals rather than members of a racial group, it is impossible to sustain the facile assumption that a white defendant can never be harmed by the discriminatory selection of an all-white jury.

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. Kiff, 407 U.S. at 503-04 (footnote omitted).11/

In addition, this Court has repeatedly emphasized that jury discrimination harms not only the accused, but "society as a whole." Rose v. Mitchell, 443 U.S. 545, 556 (1979). "[T]here is injury to the jury system, to the law as an institution, to

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11/ See also Ballew v. Georgia, 435 U.S. at 234 ("the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case").

the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S. at 195. Accordingly, the Court in Ballard refused to permit the perpetuation of all-male juries in federal court although acknowledging that the presence of women on the jury "may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded." Id. at 193-94.

The loss of those qualities referred to in Ballard -- whether the challenged exclusion is based on race, religion or sex -- inevitably affects the public perception of justice.

> There is good reason why public confidence in the integrity of the judiciary is diminished whenever invidious prejudice seeps into its processes. This diminution of confidence largely stems from a recognition that the institutions of criminal

> justice serve purposes independent of accurate factfinding. These institutions also serve to exemplify, by the manner in which they operate, our fundamental notions of fairness and our central faith in democratic norms.

Hobby v. United States, 468 U.S. 339, 352 (1984)(Marshall, J., dissenting)(footnote omitted).12/

These important social values are jeopardized by jury discrimination regardless of the defendant's race.13/ Moreover,

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12/ For the excluded juror, the prosecutor's discriminatory exercise of peremptory challenges conveys an official message of second-class citizenship that is even more direct and personal. Over a century ago, this Court observed that jury discrimination denies excluded jurors "the privilege of participating equally . . . in the administration of justice," and thereby places "a brand upon them, affixed by the law; an assertion of their inferiority . . ." Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

13/ See generally, Goldwasser, "Limiting A Criminal Defendant's Use Of Peremptory Challenges: On Symmetry And The Jury In A Criminal Trial," 102 Harv.L.Rev. 808, 835 (1989)("The harm that race-based prosecution peremptories inflict on excluded jurors and the community does not disappear when (continued...)

only the defendant is in a position to protect these social values by objecting to the state's discriminatory jury practices. This Court has recognized as much on numerous occasions:

> It is clear from the earliest cases applying the Equal Protection Clause in the context of racial discrimination in the selection of a . . . jury, that the Court from the first was concerned with the broad aspects of racial discrimination that the Equal Protection Clause was designed to eradicate, and with the fundamental social values the Fourteenth Amendment was adopted to protect, even though it addressed the issue in the context of reviewing an individual criminal conviction.

Rose v. Mitchell, 443 U.S. at 555.

The decision below largely ignores this Court's extensive body of case law discussing the problem of jury discrimina-

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13/ (...continued)
the jurors and the defendant are members of different races").

tion. Its one paragraph discussion on standing relies entirely on a single comment from Batson, which refers to a defendant's right to challenge the exclusion of jurors "of the defendant's race." 476 U.S. at 96.

That comment accurately describes the facts of Batson itself. To elevate it into a controlling principle of law, it is necessary to believe that this Court intended to overrule its decision in Peters v. Kiff without even mentioning it. Nothing in Batson even remotely supports that unlikely interpretation. It is less likely still that Batson intended to overrule the law on Sixth Amendment standing established in Taylor v. Louisiana when the merits of Batson's Sixth Amendment claim were never reached by the Court. 476 U.S. at 85 n.4.

The dispute over standing is more than an academic one. If the defendant does not have standing to object in cases like this one, then nobody does. And unlike many other contexts where the absence of standing means the absence of harm, that is not the case here.

Put in its starkest terms, the practical consequence of the decision below is to condone, in a wide category of cases, the very sort of invidious discrimination that this Court condemned only three years when Batson was decided. Amici urge this Court not to endorse that result.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

Respectfully submitted,

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Dated: April 12, 1989